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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ADAM NERSESYAN, Defendant and Appellant.	C085094 (Super. Ct. No. CRF162909)

A jury found defendant Adam Nersesyan guilty of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (b)(1))[1] and found true the allegation he used a deadly or dangerous weapon (knife) in the commission of the robbery (§ 12022, subd. (b)(1)). The trial court sentenced him to prison. On appeal, defendant contends the court erred by

[1] Undesignated statutory references are to the Penal Code.

admitting other crimes evidence and hearsay evidence, and in failing to instruct the jury about accomplice testimony.

We agree the trial court erred, but find the errors did not prejudice defendant, who was first caught on camera and then identified by two different people as the robber. Accordingly, we affirm the judgment.

BACKGROUND

We briefly summarize the facts underlying defendant's conviction. Additional background information relevant to the claims raised on appeal is discussed *post*.

On April 4, 2016, Carl Pillman was working as a loss prevention manager at the Target store in Davis. Around 12:30 p.m. he saw a person, who was later identified as defendant, quickly select multiple perfumes and place them in his cart. As Pillman watched defendant on the surveillance cameras, defendant concealed the perfume inside a "shoulder bag cooler" and walked toward the exit without paying. Pillman ran to confront him, but when he was about three to four feet away from him, defendant said, "I have a knife," and displayed one. Pillman backed off and called 911. Defendant ran to a car, got in, and left.

Video footage was shown to the jury. An image from the footage shows the robber (facing the camera) leaving the store at 12:43 p.m. He has facial hair, is carrying a large bag over his shoulder, and is wearing a long-sleeve shirt, pants, and a hat with white writing.

Natalie Avina testified she was in her car in the Target parking lot when she saw a man who was holding a big bag and wearing a sweatshirt and a hat, run out and get into a car. The car, driven by a female, sped off. Avina followed the car, took photographs of the license plate, and called 911. She described the man as "around five-seven-ish and slender."

When an officer arrived at the Target store, Pillman described the robber as a Hispanic male in his 20s, about six feet tall with an average build and facial stubble.

Pillman said the man was wearing a black baseball hat with white writing, a dark blue and white or gray quarter length shirt, blue jeans or grey pants, and gray converse-style shoes.

On May 5, 2016, Pillman identified defendant as the robber from a six-person photographic lineup. Pillman later testified at trial that at the time he made the identification, he was "80 percent" certain defendant was the robber; any doubt was due to the fact that defendant was not wearing a hat in the photo lineup, and Pillman did not "get a good look at his hairline" at the time of the crime. The photographs from the lineup were admitted into evidence and shown to the jury.

The police learned that Kelsey McAuliffe drove the getaway car. She first told them defendant had borrowed her car, but later admitted that she drove defendant to the Target store in Davis on the date of the robbery. During her trial testimony McAuliffe, a heroin addict, testified that her father owned the car but she regularly drove it. In exchange for drugs she would drive defendant around and wait in parking lots until he came back out. She knew "for the most part" what defendant was doing; she had some idea but didn't want to know more. She later implicitly acknowledged that she knew defendant was stealing items, responding to a question asking for other dates she took defendant "to steal things" only by stating that she could not remember particular dates.

McAuliffe also admitted that she was "involved in the sales" of stolen cologne and perfume in the spring or summer of 2016 with defendant's cousin, Mike Karsliyev. She referred to him as Mikey, and described him as shorter than defendant, Armenian, with a tan complexion and dark hair. She said Mikey had a cross tattoo on his face, obtained "within the last year, months or so," presumably measuring time from her testimony at the April 2017 trial. She identified a series of booking photographs as depicting Mikey; the photographs were admitted as evidence and shown to the jury over defendant's objection, as we discuss further *post*. McAuliffe specifically denied that she drove Mikey

(rather than defendant) to the Target store in Davis on the date of the robbery, but admitted that she had given Mikey rides to steal before.

The jury also heard of defendant's involvement in three prior shoplifting incidents, which we discuss in detail immediately *post*.

DISCUSSION

I

Other Crimes Evidence

Defendant contends the trial court prejudicially erred by admitting other crimes evidence. We agree that the crimes' admission was error, but find that no prejudice resulted therefrom.

A. *Background*

The People moved in limine to admit other crimes evidence pursuant to Evidence Code section 1101, subdivision (b). Specifically, the People sought to admit evidence showing that defendant: (1) attempted to steal multiple bottles of cologne from a Target store in Rancho Cordova in October 2015 by concealing them inside a backpack; (2) attempted to steal from a Costco store in Modesto in August 2015 by placing items in a shopping cart with the intent to steal them; and (3) attempted to steal several items from a Home Depot in Sacramento in June 2014 by placing the items in a shopping cart and leaving without paying. The People argued this evidence showed identity, motive, common scheme or plan, absence of mistake or accident, and intent.

At the hearing, the prosecutor briefly described that in each incident defendant admitted to stealing the items to sell them, and there was a getaway driver in the August 2015 Costco incident. The October 2015 Target incident showed identity because the conduct was "extremely similar" to the conduct in the present case, except that a knife was not used.

The trial court ruled that evidence was *not* admissible to show identity but was admissible to show common plan or design, intent, and motive. Prior to the admission of

the other crimes evidence, the court instructed the jury on the limited purpose of the evidence via pattern instruction CALCRIM No. 375.

The jury heard evidence of the other crimes as follows: On August 26, 2015, defendant went to the Costco store in Modesto. The police were called after defendant filled a shopping cart with various items and was about to leave the store. He was stopped outside on his way to a minivan driven by another man. Defendant cooperated with police. He said that he intended to steal the items and sell them. He had two knives on his person but did not threaten anyone with a knife.

On October 30, 2015, defendant took fragrances, liquor, and other items from the Target store in Rancho Cordova without paying. Defendant used a folding knife to cut security locks on some of the items. When defendant was caught by police at the front of the store, he explained that he was homeless and took the items to sell them. He made no attempt to flee, offered no resistance, and did not threaten anyone with his knife. The jury was shown video surveillance of defendant in the store as well as a photograph of him, hatless, taken by loss prevention officer after he was caught.

In neither of these two incidents did the jury hear evidence as to whether defendant was *convicted* of any crime in connection with the described conduct, but it heard testimony that defendant was detained by loss prevention and police officers and made admissions in both incidents.

The jury also heard evidence about a person named Adam who attempted to steal items from a Home Depot store in Sacramento in June 2014; this testimony was apparently an attempt to prove the third incident proffered by the prosecutor. However, due to the lack of proven connection to defendant, the testimony regarding the 2014 incident was later stricken by the trial court on defendant's motion.

B. *The Law*

The admission of other crimes evidence is governed by Evidence Code section 1101. "Subdivision (a) of section 1101 prohibits admission of evidence of a person's

character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Subdivision (b) of Evidence Code section 1101 provides, in pertinent part: "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact . . . such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ."

"The trial court has the discretion to admit evidence of crimes committed by a defendant other than the one for which he is charged, if such evidence is relevant to prove some fact at issue, and if the probative value of the evidence outweighs its prejudicial effect. [Citation.] 'When reviewing the admission of evidence of other offenses, a court must consider (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." [Citation.]' [Citation.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 951, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) " 'On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion.' " (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

C. *Analysis*

Robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by

means of force or fear." (§ 211; see *People v. Clark* (2011) 52 Cal.4th 856, 943.) As defendant acknowledges, the critical issue at trial was identity.

Defendant argued mistaken identity--it was his theory that Mikey was in fact the robber. The trial court explicitly declined to allow the other crimes evidence to prove identity. Thus, the jury was permitted to hear testimony from four witnesses, consuming approximately 50 pages of the reporter's transcript as well as video and photographic evidence, regarding three additional crimes that at best provided evidence of limited relevance toward defendant's intent to permanently deprive as well as his obvious motive (to get money) and plan (to steal). These last two are not elements of the charged crime.

The prior incidents were not particularly probative of defendant's intent in this particular case; here defendant actually *escaped* with the loot, clearly evidencing his intent to steal, whereas in the prior incidents he was caught while still inside or very near the store. If defendant's intent to steal via escaping with the merchandise had not been clear, proof of a completed heist in the recent past would be highly relevant to show intent. But not here. Thus, the two prior incidents remaining before the jury were of limited probative value and were highly prejudicial (Evid. Code, § 352) because of their tendency to paint defendant as a serial thief. Further, no proof of conviction was introduced. "A key consideration for trial courts in evaluating the prejudicial nature of the uncharged acts is whether the prior bad acts resulted in criminal convictions; prior convictions minimize the risk the jury would be tempted to punish the defendant for the uncharged acts." (*People v. Williams* (2009) 170 Cal.App.4th 587, 610 (*Williams*).)

"[N]either the prosecution nor the defendant has a right to present cumulative evidence that creates a substantial danger of undue prejudice . . . . [T]he Supreme Court [has] emphasized that cumulative evidence of uncharged offenses may be inadmissible under Evidence Code section 352. The court explained, 'In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be *merely cumulative regarding an issue that was not reasonably subject to dispute*.'

[Citation.]" (*Williams, supra*, 170 Cal.App.4th at p. 611, italics added.) The evidence of uncharged conduct should not have been admitted in this case.

However, it is not reasonably probable that defendant would have obtained a more favorable result absent the error. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1333; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008 ["Erroneous admission of other crimes evidence is prejudicial if it appears reasonably probable that, absent the error, a result more favorable to the defendant would have been reached"].)

The evidence of defendant's identity as the robber was strong. Pillman saw the perpetrator both via cameras and in person at close range. Around a month later, Pillman correctly identified defendant from a photographic lineup. He also identified defendant at trial. We note that the man in the surveillance video strongly resembles the photographs of defendant. McAuliffe knew defendant well and testified that she drove *him* to the Target store in Davis on the date of the robbery; she explicitly denied taking Mikey to that Target on that date. McAuliffe's presence at the store around the time of the robbery was corroborated by Avina's testimony and the pictures Avina took of the car's license plate. The jury was instructed multiple times on the limited use of the other crimes evidence.

In contrast, the evidence suggesting "Mikey" was the robber was extremely weak and depended on tenuous inferences. There was no evidence linking him to the actual perpetration of the crime, only suggestion. In contrast, as we have described, there was ample evidence connecting defendant to the crime. The error was harmless.

II

Exhibit 18

Defendant contends the trial court prejudicially erred in admitting exhibit No. 18, which was composed of seven dated booking photographs of Mikey. Defendant does not contest the admissibility of the images of Mikey as depicted by the photographs, instead he asserts they contained facts--namely the dates they were taken--offered for their truth

in violation of the rule prohibiting hearsay. Despite the objections to this evidence by defendant at trial, the Attorney General argues forfeiture and adds that any error was harmless without addressing the importance of the dates at issue to the suggestion that Mikey was the robber caught on video.

Although the dates were indeed inadmissible hearsay, argued by the prosecutor for their truth in closing, we find no prejudice.

A. *Background*

In support of the "Mikey" theory, defendant presented records showing that defendant's cell phone was not in Davis at the time of the robbery and expert testimony on eyewitness identification. There was also the evidence that McAuliffe was "involved in sales" of stolen cologne and perfume with Mikey and had driven him to various stores on numerous occasions to steal things.

After McAuliffe described Mikey, the prosecutor asked her to look at a series of booking photographs, marked as exhibit No. 18, and she confirmed they were pictures of Mikey. She was asked about the cross tattoo that appeared below Mikey's left eye in the later photographs. That tattoo was "pretty recent, within the last year, months or so." Based on the dated photographs, Mikey obtained the tattoo between April 15, 2015 and February 10, 2016. Thus the dated photographs established that at the time of the April 2016 robbery, Mikey had a tattoo on his face that does not appear on the face of the man in the surveillance photographs.

Defense counsel objected to the admission of the exhibit. He argued that the document did not meet the requirements of Evidence Code section 1280, the public records exception to the hearsay rule. He emphasized the dates were "problematic" as no foundation had been laid. The court overruled the objection, stating in part: "It's . . . acceptable . . . that this be shown to a witness to either confirm or deny that this is a person that she drove."

At the close of evidence, defense counsel again objected to the exhibit, stating that it did not meet the foundational requirements for a [hearsay] "exception for a public record." The trial court overruled the objection, admitting the photographs with accompanying notations in their entirety but noting that the purpose of the photographs was limited to McAuliffe's recognition of Mikey. The prosecutor instead relied heavily on the photographs and dates thereon to argue that the robber caught on camera in April of 2016 could not be Mikey because according to the dated photographs Mikey had acquired his tattoo prior to the robbery and the robber in the surveillance photographs had no tattoo.

B. *The Law*

Hearsay is an out of court statement, considered for its truth, and is generally inadmissible. (Evid. Code, § 1200.) Here, the dates on the photographs were out of court statements, argued and considered for their truth, without any foundation establishing that they fit within a recognized exception to the hearsay rule. (See *id*., § 1280.) Thus, the dates were inadmissible hearsay. We review their admission for harmless error, and decide whether it is reasonably probable that, had the dates' admission been properly denied, there is a reasonable probability that the result would have been more favorable for defendant. (*People v. Harris* (2005) 37 Cal.4th 310, 336.)

C. *Analysis*

We first decline to find the claim forfeited, as defendant's repeated objections preserved his claim that the dates were hearsay. We note that despite our request for supplemental briefing after the Attorney General's initial failure to respond to the claim of error in admitting the dates, the Attorney General continues to ignore the role of the dates in establishing that Mikey had a tattoo on his face at the time of the robbery and therefore was not the robber caught on camera. Instead, the Attorney General insists that the photographs "were admitted for a limited purpose . . . to establish that [defendant] is not his cousin and vis versa." This position ignores the record. The jury heard the

prosecutor argue repeatedly that Mikey could not be the robber because the robber had no such tattoo.

With that said, defendant's argument of *prejudicial* error cannot account for the complete lack of evidence pointing to Mikey rather than defendant as the robber, regardless of any tattoo. Although the possibility of mistaken identity was *suggested* to the jury through defense counsel's questions and argument, as well as the expert testimony casting doubt on eyewitness identification, and such *suggestion* was likely undermined by the series of mug shots detailing the timing of Mikey's acquisition of the tattoo, there was still no *evidence* connecting Mikey to the crime. Nor was there any evidence of defendant's *lack* of involvement that was undermined by the evidence of the tattoo's timing.

As discussed *ante*, the evidence of defendant's guilt was strong. By contrast, the evidence of Mikey's guilt was nonexistent and the inference was weak. McAuliffe testified that she had known Mikey for about two years, described his appearance, including the tattoo on his face and approximate timing of its acquisition, and definitively stated that she *did not* drive him to the Target store in Davis on the date of the robbery. A comparison of the various photographs of both men admitted into evidence reveals that although there is certainly a family resemblance, the cousins are distinguishable from one another. Although there was evidence that defendant's phone was *not* near the robbery, there was no evidence that Mikey's phone *was* nearby. No one claimed to have seen Mikey at the scene or heard Mikey implicate himself; nor did anyone implicate Mikey as the robber. Either with or without the cross tattoo on his face, there was no evidence that Mikey, rather than defendant, was the robber here. There was simply no evidence linking Mikey to this robbery.

Under the circumstances of this case, it is not reasonably probable that defendant would have received a more favorable verdict had the hearsay evidence been excluded.

III

Accomplice Instruction

Defendant contends the trial court prejudicially erred in failing to instruct the jury on accomplice testimony. (See CALCRIM No. 334.) According to defendant, the trial court was required to give this instruction because there was substantial evidence showing that McAuliffe was an accomplice. Although we agree that the failure to instruct was error, again we find no prejudice.

A conviction cannot be based on an accomplice's uncorroborated testimony. (See *People v. Williams* (2008) 43 Cal.4th 584, 635.) An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on the trial in the cause in which the testimony of the accomplice is given." (§ 1111.) "This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.) If there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury regarding the law of accomplices, including the need for corroboration. (See *People v. Tobias* (2001) 25 Cal.4th 327, 331.) Here, the instruction should have been given.

But a trial court's failure to instruct on the law of accomplices is harmless if there is sufficient corroborating evidence in the record. (See *People v. Avila* (2006) 38 Cal.4th 491, 562.) "To corroborate the testimony of an accomplice, the prosecution must present 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] ' "The corroborative evidence may be slight and entitled to little consideration when standing alone." [Citation.]' [Citation.]" (*Id.* at pp. 562-563.)

As we have described, a second witness (Pillman) identified defendant as the robber from a photographic lineup and at trial. The man in the surveillance footage resembles defendant. This is sufficient corroborating evidence to render the failure to instruct harmless.

IV

Cumulative Error

Concerned with the multiple errors and noting that the Attorney General assumed (without conceding) error as to all defendant's claims, we requested supplemental briefing on whether the record showed cumulative error and, if so, whether the cumulative effect of the errors was harmless. In his supplemental letter brief, defendant argues that, because each of the asserted errors alone requires reversal, the combined effect of the errors compels the same result. The People disagree, arguing that even assuming there was cumulative error, reversal is not warranted because defendant received a fair trial.

" '[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*Williams, supra,* 170 Cal.App.4th at p. 646.) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

We have found multiple errors and explained why each was harmless in isolation. We reach the same conclusion with respect to the cumulative effect of the errors, because these were not the types of error that multiply in force when combined. It is true that defendant argues each of them in some way touches on the question of "defendant or Mikey?" But they were categorically different kinds of errors.

We begin with the most troubling--the admission of the other crimes evidence where its only practical relevance was to show defendant's propensity to shoplift. But the trial court carefully and correctly instructed the jury repeatedly on the limited purpose of the evidence, which negated the likelihood that the jury would use that evidence to disregard or look askance at the suggestion that Mikey was the robber. The evidence of dates on the photographs (which depicted Mikey's facial tattoo) was not as important as McAuliffe's direct testimony that defendant was in the car with her that day, particularly because the jury could see for itself the still photograph from the surveillance video, showing defendant's face turned toward the camera. And Pittman's identification testimony, while inevitably imperfect, was solid. Finally, there is no reason to think that an accomplice instruction would have tipped the scales and led the jury to conclude McAuliffe was trying to shield Mikey from liability by pointing the finger at defendant. Particularly where she was well corroborated, as in this case.

Having reviewed the record and assessed the strength of the evidence and any unfairness from the errors, we cannot conclude that the combined effect of the errors requires reversal. It is not reasonably probable that the jury would have reached a result more favorable to defendant in the absence of the errors. The errors did not render defendant's trial fundamentally unfair individually or in combination. Accordingly, the cumulative error doctrine provides no basis for reversal.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Murray, J.